No. 12,378

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and its Agent, Lloyd A. Mashburn; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607, of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., and its Agent HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, REGIONAL DIRECTOR OF THE TWENTY-FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

STATUTES

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Los Angeles Building and Construction Trades Council, and its Agent, Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., and its Agent Herman Barbaglia,

Appellants,

vs.

Howard F. Lebaron, Regional Director of the Twenty-First Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

Comes now Los Angeles Building and Construction Trades Council, and its Agent Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., and its Agent Herman Barbaglia, appellants in the above entitled matter and respectfully petitions the Court to set aside its opinion heretofore issued on December 8,

1950, and to grant a new hearing in this matter and as reasons therefore respectfully show:

I.

That the aforementioned opinion, issued December 8, 1950, by the Court *en banc,* declined to sustain the appeal of appellants to set aside a decree of the United States District Court for the Southern District of California entered on the 8th day of June, 1949, in which the above named appellants had been erroneously enjoined under a purported Statute of the United States, namely, the National Labor Relations Act, as amended (Public Law 101, 80th Congress), which statute as applied to appellants and is in and of itself unconstitutional and void.

II.

The Court in disposing of the appeal herein relied exclusively upon the following decisions as conclusive authority to affirm the decree of the lower court. (*Printing Specialties and Paper Convertors' Union v. Le Baron,* 171 F. 2d 331; *Building & Construction Trades Council v. Le Baron,* 181 F. 2d 449; *Hughes v. Superior Court,* 339 U. S. 460; *Teamsters' Union v. Hanke,* 339 U. S. 470; *and Building Service Union v. Gazzam,* 339 U. S. 532.)

In doing so, the Court has misapplied these decisions. The purport of all of these decisions has only to do with the right, under a pubic policy of a sovereign, to restrict certain *picketing activities,* or rather to curtail them under certain circumstances. In reaching the above decisions, the Supreme Court of the United States was careful to observe the dual nature of picketing as a means of conveying information and a means of "economic compulsion." It was the abuses of the constitutional rights to picket which the Court condemned and not the right to communication.

But the important considerations of those cases are inapposite here. *In the instant matter there was no picketing.* By relying, solely, upon these cases, the Court denies to appellants the constitutional guaranty of freedom of communication which does not involve acts coupled with "economic pressure." Rather, the instant matter deals solely with *the rights of employees to give or withhold their personal services,* depending upon the conditions of work, wages, etc.

III.

The Court seems to have given no consideration to the fact that the statute and the decree (which merely parrots the language of Section 8(b)(4)(D) of the statute) forecloses the acknowledged right of freedom of communication between members of these unions, in their homes, union halls, on the streets, or wherever they may gather to discuss their ideas, problems and opinions. The long arm of the court, through its injunctive action, has closed the mouths of these interested citizens or has made it impossible or unsafe for each of them to give vent and voice to their own ideas about the conditions under which they will be willing to work.

In choosing to follow the above mentioned cases, the court seems to have ignored, completely, the long line of cases in which the Supreme Court has carefully preserved the constitutional right of freedom of expression. Much of the law proclaimed by these cases has been precipitated in defiance of regulatory statutes, such as the one under consideration here. Beginning with *Lovell v. Griffin,* 303 U. S. 444, in the spring of 1938, this defiance has occasioned no less than thirty-four cases, leading to eighteen

decisions by the Supreme Court.[1] These cases involved primarily the constitutional immunities of religious activities. However, freedom of speech was inextricably interwoven into all of them as a result of the constitutional doctrine developed.

The position taken in these cases is that all the First Amendment rights are to be grouped from the standpoint of the extent of constitutional protection granted them against interference through regulatory laws. This principle is explicitly stated in *Prince v. Massachusetts, supra,* the court saying:

> "All are interwoven there together. Differences there are, in them and the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. . . . But in everyday business of living, secular or otherwise these variant aspects of personality find inseparable expression in a thousand ways. *They cannot be altogether parted in law* more than in life." (Emphasis added.)

A number of specific rules of constitutional consideration have been developed in these cases. Thus, the mere inconvenience of the public from the attempts at communication furnishes no reason for the suppression of communication. (*Schneider v. California, supra.*) Proprietary inter-

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[1]*Prince v. Massachusetts,* 321 U. S. 158; *Lovell v. Griffin, supra; Sartin v. Struthers,* 319 U. S. 141; *Schneider v. California,* 308 U. S. 147; *Jones v. Opelika,* 319 U. S. 103; *Cantwell v. Connecticut,* 310 U. S. 296; *Minersville Dist. v. Gobitis,* 310 U. S. 586; *Cox v. New Hampshire,* 312 U. S. 569; *Jamison v. Texas,* 318 U. S. 413; *Murdock v. Pennsylvania,* 319 U. S. 106; *Douglas v. Jeannette,* 319 U. S. 157; *Taylor v. Mississippi,* 319 U. S. 583; *Bd. of Education v. Barnette,* 319 U. S. 624; *Marsh v. Alabama,* 326 U. S. 501; *Tucker v. Texas,* 326 U. S. 517.

ests afford no right to intrude upon rights protected by the First Amendment. (*Marsh v. Alabama, supra.*) The annoyance implicit in the orderly and peaceful exercise of the above protected rights must be accepted as a part of the price we pay for freedom and the fact that the choice of the place for the distribution of ideas may cause civic inconvenience is not enough to justify the deprivation of those rights. (*Schneider v. California, supra.*) Even the ringing of door bells and solicitations at private homes are protected under the free speech Amendment. (*Martin v. Struthers,* 319 U. S. 141.)

When the basic doctrines of these cases are brought to bear upon the broad restraints of the statute and the decree, it appears that neither the statute nor the decree can stand for unquestionably they restrain and are designed to restrain and prohibit any form of communication between union members which may have the possible effect of persuading other members to withhold their services in the interests of the membership as a whole. Indubitably, any discussion of ideas pertaining to the withholding of services, which is taken up as a union matter, in the confines of the union hall, if they have the effect of influencing any of those present to join with their fellows to refuse to work under conditions abhorrent to them is restrained and enjoined by the decree and the statute under penalty of contempt. The founding fathers never intended the exercise of free speech to be burdened in such a manner or to such an extent. *"The right thus to discuss and inform people concerning the advantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly." Thomas v. Collins,* 323 U. S. 516. (Emphasis added.) The restrictions placed by the statute and the decree upon the "free trade of ideas"

flounts the immunities of the constitutional privileges. The deprivation of the right to persuade to action likewise affronts the constitutional protections of freedom of expression. "Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and *to preserving the right to urge it that the protections are given.*" *Thomas v. Collins, supra.* Plainly, the design of the statute and decree is to repress action of union members who, believing the conditions of work undesirable or unconscionable, elect not to work under those conditions and to withdraw their skills until more desirable conditions are obtained. The destruction of these rights by the statute and the decree cannot be justified when the plain purport of the First Amendment is brought into focus.

> "We should be eternally vigilant against attempts to check expressions of opinions . . . unless they so imminently threaten . . . that an immediate check is required to save the country." (Mr. Justice Holmes in *Abrams v. U. S.,* 250 U. S. 616 at 630.)

IV.

The likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or of the press. Even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. (*Bridges v. California,* 314 U. S. 252; *Schneider v. Irvington,* 308 U. S. 147.) Thus the mere declaration by the congress does not in and of itself become enough to deprive of liberty of free speech but as Mr. Justice Holmes states, must be of such a stature

that failure to stem it will destroy our country. These two cases, cogently discusses the so-called "clear and present danger" doctrines and that to warrant suppression of speech, assembly and action the situation covered must be extremely serious. This phase is discussed by the Supreme Court in the *Bridges* case as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be *extremely serious* and the degree of imminence extremely high before utterances can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum of compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It *prohibits any law 'abridging the freedom of speech or of the press'*. It must be taken as a *command* of the *broadest* scope that explicit language, read in a context of a liberty-loving society, will allow." (Emphasis added.)

V.

The heavier demands of the Due Process clause of the Fifth Amendment when read in context with the First Amendment has been extended and clarified in this last decade. The special sanctity of the First Amendment liberties as compared with other constitutional liberties has been undebatable since the establishment of the "clear and present danger" rule in *Schenk v. U. S.*, 249 U. S. 47 at 52, and it has been strengthened by every First Amendment case since that time. This substantial clarification of this special sanctity was made in the *Bridges* decisions, *supra*, and has been reiterated by the Supreme Court in *Pennekamp v. Florida*, 328 U. S. 331, and *Craig v. Harney*,

331 U. S. 367. The demands of the constitutional due process, when coupled with free speech questions are considerably more exacting. What suffices in other situations does not suffice when the precious freedoms of the First Amendment are involved. "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . ." *Thomas v. Collins, supra.*

In *Board of Education v. Barnette,* 319 U. S. 624, Mr. Justice Jackson speaking for the court says:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the fourteenth amendment as an instrument for transmitting the principle of the first amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the principles of the first, is much more definite than the test when only the fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the first becomes its standard. The right to regulate, for example, a public utility may well include, so far as due process is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the fourteenth amendment which bears directly upon the state it is the more specific limiting principles of the first amendment that finally governs the case." (At 639.)

When the substance of this reasoning is read into the facts of this case, the provision of Section 10(k) of the act glaringly becomes violative of the due process required. That it is a system of compulsory arbitration is conclusively apparent. More, it deprives, arbitrarily, the freedom of discussion of members of a union who find that there are extant, circumstances detrimental to their interests or constitute conditions of work under which they are not willing to perform their skills.

> "Whatever occasion would restrain orderly discussion and persuasion . . . must have clear support in public danger. Only gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins, supra.*

VI.

The Labor Management Relations Act of 1947, *supra*, like its predecessor, the National Labor Relations Act, found its basic constitutional support under the Commerce clause of the Constitution. (*Jones and Laughlin v. N. L. R. B.,* 301 U. S. 1.) That clause was a part of the established constitution. The Bill of Rights, on the other hand was required by the people before they would consent to the adoption of the original document. The Bill of Rights was insisted upon because the people were afraid, that without the restrictive provisions of the Bill of Rights upon those chosen to administer and legislate under the constitution, those sacred rights would be frittered away by legislatures from political or selfish motives. The history of the Bill of Rights reveals an intent by the people not to surrender those rights to the government in the exercise of the original seven Articles. Thus, while the power of congress to regulate commerce among the several states was granted by the states to the federal government by *Article*

I, Section 8, the states and the people did not grant but expressly withheld from the congress, while in the regulation of commerce, the power to abridge freedom of speech and assembly. The likelihood of such an attempt, under the guise of the commerce power, was intentionally checkmated. Thus, while the power to regulate commerce is a broad one, its exercise cannot be an excuse for the deprivations of the freedoms so carefully safeguarded by the states and the people.

Therefore, congress, under its commerce powers, cannot deprive appellants, their agents and members from the freedom of expression, of the "trade of ideas" and the right to "persuade to action." It cannot invade the thoughts and minds of union members and restrict or prohibit those thoughts or mental operations. Congress cannot, under the guise of commerce regulation, deprive discussion among union members, or any others, of the conditions under which they will consent to work or the extent they will adhere one to the other to gain for their collective or individual interests advantages of better living or conditions of work or of wages.

VII.

Wherefore, appellants pray that the opinion of the court *en banc* be set aside, that the Court grant a further hearing in the matter and for such other and proper relief as to the court seems just and proper.

Respectfully submitted,

James M. Nicoson,
Arthur Garrett,
Attorneys for Appellants.

Certificate of Counsel.

James M. Nicoson respectfully certifies that he is one of the attorneys for appellants herein, that in his judgment the aforementioned Petition for Rehearing is well founded and that it is not proposed for the purpose of delay.

JAMES M. NICOSON,
Attorney for Appellants.